(8)

No. 98-5864

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOMMY DAVID STRICKLER,
Petitioner,

v.

FRED W. GREENE, Warden,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

The Court directed the parties to address the following questions:

1. Whether the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

2. If so, whether the State's nondisclosure of exculpatory evidence and the State's representation that its open file contained all Brady material establish the requisite "cause" for failing to raise a *Brady* claim in state proceedings.

3. Whether petitioner was prejudiced by non-disclosure.

PARTIES TO THE PROCEEDINGS

All parties are named in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of habeas corpus relief (J.A. 403-34) is not reported, but the judgment is noted at 149 F.3d 1170. The opinion of the district court granting habeas corpus relief (J.A. 382-402) likewise is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1998. A timely petition for rehearing was denied on July 14, 1998. The petition was filed on September 1, 1998, and was granted on October 5, 1998. 119 S. Ct. 27 (1998). This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial [] by an impartial jury * * * [and] to be confronted with the witnesses against him * * *." The pertinent provisions of the Virginia Code and of the Rules of the Supreme Court of Virginia are reproduced in the appendix to this brief beginning at page B-1.

STATEMENT OF THE CASE

Leanne Whitlock, a student at James Madison University, was last seen alive on January 5, 1990. Eight days later, her nude body was recovered from a wooded area in the Virginia countryside, where it had been buried under logs and covered with leaves. Near the body, police found a large rock with blood stains suggesting that it had been used to crush the victim's skull. In a nearby cornfield, a farmer and the police found a pile of Ms. Whitlock's frozen clothing, a blue baseball cap, and a wallet belonging to one Ronald Henderson. J.A. 85-88, 408-09. Although the victim was black, Caucasian hairs were found on her clothing and in the cap. *Id.* at 135-37.

Henderson and petitioner (who had later been seen, together with a white female, in open possession of the car the victim was driving at the time she disappeared) were both charged with Ms. Whitlock's abduction, robbery and capital murder. Henderson, who fled and was tried last, was acquitted of capital murder. J.A. 2-7, 329.[1]

[1] Henderson was convicted of first-degree murder and sentenced to life imprisonment. He and petitioner were also convicted of abduction and robbery and received life imprisonment sentences on those counts.

Based primarily on the testimony of Anne Stoltzfus, a purportedly disinterested eyewitness who claimed in vivid, chilling detail that she had witnessed petitioner's forcible abduction of Ms. Whitlock, the Commonwealth convicted petitioner of capital murder and sentenced him to death. The Supreme Court of Virginia affirmed his convictions and sentences, and later affirmed the denial of collateral relief. The United States District Court for the Eastern District of Virginia, however, granted him a writ of habeas corpus after finding that the Commonwealth withheld exculpatory evidence that, by showing that the bulk of Stoltzfus' "memories" likely resulted from coaching by the police and those close to the victim, would have destroyed Stoltzfus' credibility and furnished grounds for barring her testimony as unreliable altogether. The court of appeals reversed. J.A. 403-34.

A. State Court Proceedings

1. *The Trial*

1. The prosecution's theory at trial was that petitioner, armed with a weapon, abducted Leanne Whitlock from the parking lot of the Valley Shopping Mall ("Mall") in Harrisonburg, Virginia, and forced her to drive her car to a field outside of town, where he robbed and killed her. The prosecution's proof and argument were intended to show that petitioner acted in concert with Ronald Henderson and with an unidentified blonde woman, but that petitioner was the one who initiated the abduction, used a weapon to accomplish it, and was the instigator, architect, and prime mover of the harm that befell the victim. To paint that picture of petitioner as chief architect of the crime, the State relied extensively on the testimony of Stoltzfus, a purported eyewitness to Ms. Whitlock's abduction. In her detailed trial testimony, Stoltzfus unhesitatingly identified petitioner as a man whom she had had ample occasion to notice at the Mall before Ms. Whitlock appeared on the scene, vividly recounted how she then saw petitioner burst into Ms. Whitlock's car as she arrived

at the Mall, and furnished the key factual predicates for the prosecutor's argument that once inside Ms. Whitlock's car, petitioner secured the victim's acquiescence to the abduction by brandishing a knife.

2. After swearing that she knew where she was on January 5, 1990, Stoltzfus testified that she and her fourteen year old daughter drove to the Mall to purchase a compact disc for another of Stoltzfus' daughters, for whom they were having a late Christmas. They arrived as Musicland, one of the Mall's stores, at about six o'clock. J.A. 36. While Stoltzfus and her daughter waited for a Musicland employee to assist them, a blonde woman and a man whom Stoltzfus called "Mountain Man" came into the store. *Ibid.* "Mountain Man" was "very impatient" and so "frightened" Stoltzfus that she backed into another Musicland patron, "a tall dark haired fellow" whom Stoltzfus called " 'Shy Guy' because he seemed a bit shy." *Ibid.* "Shy Guy" had a tan-colored coat draped over his arm, and Stoltzfus felt something hard in the coat when she bumped against it. According to Stoltzfus, "Shy Guy" "seemed kind of defensive and quickly put [the coat] on." *Id.* at 37. Stoltzfus apologized to "Shy Guy," and told the Musicland clerk to wait on "Mountain Man" first "because he seemed very impatient and revved up." *Id.* at 36.

Stoltzfus testified that she left the store and returned at 6:45 p.m. At that time, she observed "Shy Guy" walking by himself, followed in the distance by the blonde woman and then by "Mountain Man." "Mountain Man" was calling after the blonde woman, "Donna, Donna, Donna." J.A. 38. Stoltzfus "stopped in [her] tracks because ["Mountain Man"] was so revved up that [she] was concerned." *Id.* at 39. "Mountain Man" and the blonde woman had a brief conversation, during which Stoltzfus claimed they referred to "Shy Guy" as "Ronnie."[2]

[2] According to Stoltzfus' testimony, "Mountain Man" asked the blonde woman where "Ronnie" was. She replied "up there."

As the blonde woman turned to leave, she bumped into Stoltzfus and a button in her attire caught in Stoltzfus' open weave sweater. Still "concerned about their behavior," Stoltzfus "tr[ied] to follow them," but was unsuccessful. *Id.* at 39, 40. She and her daughter then returned to Musicland, only to find that no one knowledgeable about her proposed CD purchase was on hand. They decided to leave the Mall. *Id.* at 40.

As Stoltzfus and her daughter prepared to drive out of the parking lot, Stoltzfus claimed she noticed a shiny dark blue car driving in. The driver, a young black woman, "was beautiful. She was well dressed and she was happy, she was singing * * *." J.A. 41. Stoltzfus recalled pulling into a lane of traffic immediately behind the blue car. Just ahead of the blue car, a minivan stopped to drop off some passengers and brought traffic to a standstill. *Id.* at 42. At that time, "Mountain Man" came "tearing" out of the Mall entrance door and ran up to the driver of the van. He was talking to the driver of the van "and then was just really mad and ran back and banged on back of the backside of the van and then went back to the Mall entrance wall where 'Shy Guy' and 'Blonde Girl' was standing." *Id.* at 42-43. After briefly accosting the passengers in a vehicle that was waiting behind the van, "Mountain Man" moved on to the blue car, which he began pounding and shaking on the passenger side. And "then he just really shook it hard and you could tell he was mad." The door finally gave way, and "Mountain Man" jumped inside the blue car. *Id.* at 43-44.

According to Stoltzfus' account, the driver of the blue car attempted to push "Mountain Man" away. Mountain Man opened the passenger door and motioned for "Shy

"Mountain Man" then expressed a desire to leave the Mall, to which the woman replied that "Mountain Man" and "Ronnie" should meet her at the bus stop. J.A. 39.

Guy" and the blonde woman to join him inside. The blonde woman came to the car and put her left foot up inside. J.A. 44. The driver of the blue car "just laid on the horn" while "Mountain Man" repeatedly hit her. *Ibid.*[3] Stoltzfus "became concerned and upset" and "honked [her own] horn." *Id.* at 45. "Mountain Man" stopped hitting the young driver and opened the door again. "Shy Guy" and the blonde woman got into the back seat of the car. "Shy Guy" handed his coat over the seat to "Mountain Man," who "fiddled with it" for a long time. *Id.* at 45. After he was done "fiddling" with the coat, "Mountain Man" faced the driver "and the other two in the back seat sat back and relaxed." *Ibid.*

Stoltzfus went on to recount in chilling detail how she approached the driver of the blue car—first by pulling up in her own car and then on foot—and repeatedly inquired whether the driver was "O.K." J.A. 45-46. Stoltzfus' approach caused "Shy Guy" to cower in the back seat, but elicited little reaction from the driver of the blue car, who appeared completely frozen. To every one of Stoltzfus' inquiries, the driver responded by making "direct eye contact and then look[ing] down. Just very serious, looked down to her right." *Id.* at 46. At last, the driver "just mouthed a word" which Stoltzfus did not immediately understand, but soon realized was "help." As Stoltzfus argued with her daughter about what should be done, the blue car began to drive away—once again with the horn blaring. *Id.* at 48. Stoltzfus gave her daughter a "3 x 4 index card" and instructed her to write down

[3] As Stoltzfus put it in her trial testimony (J.A. 44):

> The horn must have blown, blew a long time and she couldn't go because the three people who had been in the [car immediately ahead] were now walking from the parking lot in front of the [blue] car into the Mall. O.K., but when she stepped on the gas to go forward, the Blonde Girl jumped back and of course didn't get into the car and so she is just laying on the horn now and Mountain Man started hitting her and hitting her.

the blue car's license number. Stoltzfus claimed to remember that license number—"West Virginia, NKA 243"—because she had told her daughter at the time "to remember, No Kids Alone, 243, and I said 'remember, 243 is my age.'" *Id.* at 48. The blue car drove off. Stoltzfus did not call the authorities.

Asked if she got "a good look" at "Mountain Man" and "Shy Guy" during the incidents she purportedly witnesed on January 5th, Stoltzfus responded "Oh yes, I certainly did." J.A. 38. She elaborated that she remembered how the two were dressed, described their clothing in great detail, and she even remembered that their clothing was not at all soiled in any way. *Id.* at 37-38. Stoltzfus also asserted that she "absolutely" got a good look at the driver of the blue car. She positively identified petitioner in open court as "Mountain Man," and, from photographs, also unequivocally identified the driver of the blue car as Leanne Whitlock. *Id.* at 42, 49-50.

3. The cross-examination of Stoltzfus, a civilian witness with no apparent bias or other evident motive to fabricate such a highly detailed, shocking tale, understandably focused on the reliability of her recollections and, particularly, of her in-court identifications. Stoltzfus, however, skillfully parried all defense attempts to impugn her precise and seamless account. She forcefully invoked her "exceptionally good memory" and her various opportunities to observe the three malefactors, up-close and at length, to buttress her unequivocal in-court identification of petitioner:

> I have an exceptionally good memory. I had very close contact with him and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification.

J.A. 58; *id.* at 59 (same with respect to "Shy Guy").

Indeed, Stoltzfus asserted that she had given "detailed descriptions of the three persons" (J.A. 57) when she first

spoke to law enforcement, claimed that she told the police "exactly" what she testified to at trial (*id.* at 52), and insisted that she had positively identified petitioner and "Shy Guy" in police photo line-ups early in the investigation, strongly suggesting that she had told a consistent, unwavering story from the beginning:

> I was very sure of the two men I was shown. I was shown "Mountain Man" on Friday afternoon and I was one hundred percent sure because of the profile and the distinctive nose. Monday I was confident of the identity of "Shy Guy." The "Blonde Girl," I was a little less sure of.
>
> * * * *
>
> I picked two [photographs] with absolute certainty and the third with a slight reservation.

Id. at 56. With respect to her inability to identify the blonde woman with any certainty, Stoltzfus stated that she "thought" one of the pictures in a photo spread was "Donna," but that she had been "very distress[ed]," while waiting in the witness room, to see that another witness in the case against petitioner "look[ed] like her too." *Id.* at 60.

4. The Comonwealth did not call Stoltzfus' daughter, any employee of Musicland, or any other Mall patron to testify about the bizarre, presumably noticeable public conduct related by Stoltzfus. The Commonwealth did call two additional witnesses who were meant to provide direct evidence against petitioner. The first, Kurt Massie, claimed that he was driving (with a friend) on Route 340 at 7:30 p.m. on January 5th. It was already dark. Massie nonetheless claimed he saw petitioner, whom he had never before met, drive a dirty blue car with *two* additional occupants (one man and one woman) into a field near where the victim's body was later found. J.A. 66-67, 70. He also claimed all occupants of the vehicle were *white*. *Id.* at 72-73.

The second witness, Donna Tudor, agreed to testify for the Commonwealth after she was arrested for grand lar-

ceny based on her possession of Ms. Whitlock's car. (Despite her willingness to testify for the prosecution, the Commonwealth kept her incarcerated as a flight risk). J.A. 97-98, 100. She claimed that Henderson and petitioner arrived at Dice's Inn, a bar in Staunton, at around 9:30 p.m. on January 5th. According to Donna, petitioner was wearing dirty, bloody blue jeans. Donna left the bar with Henderson and petitioner in a blue car.[4] She claimed to have heard petitioner and Henderson, once inside the car, discuss having crushed "it" and use a racial epithet; she also described an altercation between petitioner and Henderson during which petitioner allegedly threatened Henderson with a knife. *Id.* at 90-95. Petitioner and Donna spent the next week together, driving around town and elsewhere in the blue car. Donna claimed at trial that, during that time, she saw petitioner in possession of the victim's bank card, identification documents and other property, including a pair of earrings that were found in Donna's possession when she was later arrested. *Id.* at 96-97. It was then that she first claimed that the earrings were a gift from petitioner.[5]

Donna's account was subject to devastating impeachment. Not only did she testify in an effort to curry favor with the prosecutor and to shift suspicion away from herself, but several of Dice's patrons who were called by the *prosecution* did not agree with Donna's claim that petitioner's clothes were "bloody" or otherwise remarkable

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[4] Donna Tudor identified photographs of a car owned by Leanne Whitlock's boyfriend, John Dean, which Ms. Whitlock had borrowed from him the day she disappeared. J.A. 90, 17-18. Donna described how petitioner cut up the interior and jumped on the roof of the car several days later, after a fight with Donna. *Id.* at 98-99. That particular manifestation of a lover's quarrel suggests that petitioner viewed the car as *Donna's* property.

[5] Donna Tudor also claimed that petitioner's mother had washed bloody clothes petitioner was wearng on January 5th. That claim was squarely disputed by petitioner's mother and sister. J.A. 143, 147.

when he arrived at Dice's Inn.[6] In addition, her husband, Jay Tudor, testified that Donna had earlier admitted to him that *she* had been present during Ms. Whitlock's murder, and that petitioner did *not* participate in the crime. J.A. 151. Instead, Donna had related that the victim knew Henderson and petitioner and she had *voluntarily* "picked [them] up" "a couple of days" before she was killed. *Id.* at 153-54. According to Donna's earlier statement, Donna was in the victim's car on the day of the murder, while "the other boy and girl w[ere] outside the car [in the corn field] and she tried to get away * * *. [T]he other fellow jumped on her and started beating her and couldn't stop." *Id.* at 154. He used his "fist * * * and a rock." *Ibid.*

The remainder of the Commonwealth's case was circumstantial. A forensic expert testified for the prosecution that a *single* Caucasian hair fragment and *two* Caucasian head hairs that were found on the victim's clothing "could" have originated from petitioner, based on similarities in microscopically identifiable characteristics. J.A. 136. His opinion was expressly couched as a possi-

[6] Debra Sievers was at Dice's Inn and examined petitioner closely enough to determine that he was not wearing jeans, but pants that "looked like jeans" because they were made of denim. J.A. 79. She testified that petitioner's pants "were a little dirty," but otherwise there was nothing noticeable about them. *Ibid.* Carolyn Brown also saw petitioner at Dice's, but "didn't pay all that much attention to him * * * he was dressed right nice I thought." *Id.* at 75. Further prompting and leading questions from the prosecutor elicited from Brown only that petitioner's pants were "a little bit dirty * * * like they had been wore a couple days or so." *Ibid.* A third patron, Nancy Simmons, *danced* with petitioner yet gave no testimony that there was anything remarkable about his clothing. She did testify that *Henderson* danced with her and gave her a watch (*id.* at 81-82), which was later identified as belonging to the victim. (The Virginia Supreme Court stated that *petitioner* gave Simmons the watch (*Strickler v. Commonwealth*, 404 S.E.2d 227, 230 (Va.), *cert. denied*, 502 U.S. 944 (1991)), a flat misstatement of the record entitled to no deference under 28 U.S.C. 2254(d); *cf. Yates v. Evatt*, 500 U.S. 391, 410 (1991) (rejecting state court's characterization of evidence as "not supported by the record")).

bility ("could"), because "[h]air identification is not a positive means of identification. By that I mean I cannot definitely say that a hair originates from a certain individual to the exclusion of all other people in his or her race group * * *." *Id.* at 134. The same prosecution expert also testified that the great bulk of Caucasian hairs found at the scene (mostly in the blue baseball cap found near the victim's clothes and Henderson's wallet) "could *not* have originated" from petitioner. *Id.* at 137 (emphasis added). Another forensic expert reported that she found human blood stains on a pair of blue jeans seized (at Donna Tudor's instigation) from the residence of petitioner's mother; one such stain could be identified as type "O." Id. at 123, 125-26. While that was the victim's blood type, it also is *petitioner's*. *Id.* at 122.[7] Other forensic experts established petitioner's presence in the blue car. It was essentially undisputed that petitioner openly possessed the car while he cohabitated with Donna Tudor for several days *after* the murder. *Id.* at 94, 115, 129.[8]

[7] The Commonwealth also introduced expert testimony that some clothing worn by petitioner (to which Donna Tudor led them, after the two cohabitated for a week) contained semen stains. J.A. 410; Trial Tr. 706-07. Because vaginal swabs taken from the victim had shown the presence of semen, the prosecution evidently had hoped to suggest that petitioner had raped the victim. That tactic fizzled when the victim's boyfriend, John Dean, admitted that he and the victim had consensual sexual relations the night before she disappeared (J.A. 20), and the Commonwealth' pathologist testified that petitioner could *not* be the source of the semen found in the victim. Trial Tr. 715-16. In summation, the prosecutor disclaimed any contention that *petitioner* had raped Whitlock, but argued that the semen was probably Henderson's, who could not be tested because he was a fugitive. J.A. 165-66. On that basis, the prosecutor urged the jury to conclude that the abduction related by Stoltzfus was motivated by an intent to defile Ms. Whitlock. *Id.* at 165 ("they did it so that one or both men could rape her").

[8] A defense witness, Kenneth Workman, testified that Ronald Henderson arrived at Workman's house at around 4:30 a.m. on January 6th, completely drunk and "talking about [how] *he* killed" someone to whom he referred with a racial epithet. J.A. 139 (em-

In closing, the prosecutor stressed at the outset Stoltzfus' testimony, highlighting her account of Ms. Whitlock's abduction as something that could "not be disputed beyond any doubt, beyond any question at all." J.A. 165. The prosecutor also stressed how "lucky" the jury was "to have an eyewitness who saw what happened out there in that parking lot." *Id.* at 169. And he expressly relied on Stoltzfus' detailed account to urge the conclusion that petitioner must have subdued Ms. Whitlock with a knife. *Id.* at 170. The jury found petitioner guilty of capital murder.

2. ***State Appellate And Collateral Review***

1. The Supreme Court of Virginia affirmed petitioner's conviction and death sentence on direct appeal. *Strickler v. Commonwealth*, 404 S.E.2d 227 (Va.), *cert. denied*, 502 U.S. 944 (1991). Among other assignments of error, the court rejected petitioner's claim that the trial court should have granted his motion for a bill of particulars. The court explained that "[l]imited discovery is permitted in criminal cases by the Rules of Court," but that petitioner "had the benefit of all the discovery to which he was entitled under the Rules." *Id.* at 233 (citing Rule 3A:11).[9] The court also upheld petitioner's death sentence on the ground that the jury properly found

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phasis added). Henderson "had blood and stuff on his pants." *Ibid.* The prosecutor's cross-examination highlighted the fact that Henderson was intoxicated, implicitly suggesting that his assertions were unreliable. *Id.* at 141. At Henderson's later trial, however, the prosecutor called Workman as the Commonwealth's witness to prove Henderson's guilt of the murder.

[9] Rule 3A:11, which applies "to prosecution for a felony in a circuit court," governs the discovery available to criminal defendants. It provides for inspection by the accused of evidence "material to the preparation of his defense [if] the request is reasonable," but it expressly shields from discovery "statements made by the Commonwealth witnesses or prospective Commonwealth witnesses or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case" (other than certain scientific expert reports prepared in connection with the investigation).

"future dangerousness" and "vileness." For both factors, the court relied heavily on its assesment of petitioner's role in the victim's abduction and murder. With respect to the former, the court found "[m]ost significant[] [that] the jury had before it [petitioner's] violent behavior before and during the commission of the present crime" as well as the subsequent conduct and statements related by Donna Tudor. *Id.* at 236. As to the latter, the court emphasized the horror experienced by Ms. Whitlock during the abduction and while contemplating her impending death. *Id.* at 237.

2. In state habeas corpus proceedings, petitioner alleged that trial counsel were ineffective for not formally seeking *Brady* materials at trial. Respondent countered with the affidavit of petitioner's trial counsel who stated that "[w]e were aided by the prosecutor's office, which gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files * * *." J.A. 223. Based upon that representation, respondent argued that because "counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion." *Id.* at 213. Petitioner also contended that trial counsel were constitutionally defective in failing to object to an instruction that permitted the jury to convict him of capital murder on the basis of two underlying offenses, one of which—"abduction * * * with the intent to defile"—could not, under applicable law, support a capital murder conviction. *Id.* at 209. Respondent agreed that "abduction with the intent to defile is not one of the predicate felonies for capital murder," but argued that the overbroad instruction "was not prejudicial" because "the jury unanimously found beyond a reasonable doubt that [petitioner] was guilty of robbery while armed with a deadly weapon." *Id.* at 218. Finally, petitioner claimed that the trial court erred by not ordering discovery. Respondent asserted that this issue had already been resolved on direct appeal. The circuit court granted respondent's motion to dismiss the habeas corpus petition. *Id.* at 247-48.

The Supreme Court of Virginia granted review "limited" only to the issues arising from the concededly defective "intent to defile" instruction. *Strickler v. Murray*, 452 S.E.2d 648, 648-49 (Va.), *cert. denied*, 516 U.S. 850 (1995). That court rejected petitioner's ineffective-assistance claim on the ground that he could not show "prejudice," since the jury had *also* been instructed in the alternative on armed robbery, a permissible predicate for capital murder. The court again placed substantial reliance on the probative force of Stoltzfus' testimony to conclude that there was "overwhelming" evidence that petitioner killed Ms. Whitlock "in the commission of a robbery while armed with a deadly weapon." *Id.* at 652-53 (summarizing Stoltzfus' account of how petitioner burst into "the car that Leanne was driving" and "repeatedly struck her").

B. Federal Habeas Corpus

1. In federal district court, petitioner sought and received an ex parte order permitting his counsel to examine and copy all police and prosecution files in the case. That order led to the discovery of letters written by Stoltzfus and of notes and reports prepared by Detective Claytor of the Harrisonburg Police Department—the lead investigator in the case—that reflected statements made by Stoltzfus over the course of the investigation. Those documents were found in the files of the Harrisonburg Police Department, and it is undisputed that most of them (five out of eight) were not in the "open file" that had been tendered by the prosecutor in purported compliance with the government's discovery obligations. J.A. 400-01. The district court concluded that respondent could not rely on procedural default rules to preclude consideration of petitioner's ensuing *Brady* claim, either because "[d]efense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout [p]etitioner's state habeas proceedings," or, alternatively, because petitioner's trial counsel were ineffective in failing

to move for disclosure of *Brady* materials at trial. *Id.* at 287, 276-79.

After carefully reviewing the newly discovered documents, the district court concluded that they "contradicted or impeached [Stoltzfus'] trial testimony in many crucial respects." J.A. 387. Among other things, those documents made clear that Stoltzfus initially could not identify Ms. Whitlock, and that Stoltzfus' subsequent in-court identification resulted from her extensive exposure to Ms. Whitlock's photographs during a lengthy private meeting with the victim's boyfriend, John Dean. Those documents also revealed that Stoltzfus initially was not sure she could identify the white males and that, far from positively identifying petitioner from a photo spread, she merely stated that he "resembled" one of the men she had seen. Indeed, at first she could not even recall having been present at the Mall *at all* on January 5th. *Id.* at 389.

The documents also reflect how crucial details of Stoltzfus' in-court testimony emerged—amidst her admissions of faulty memory and of reliance on the recollections of another—only as Stoltzfus met for several hours with the victim's boyfriend and, on numerous occasions, also with Det. Claytor, thus powerfully suporting the conclusion that her trial testimony resulted from suggestion, fabrication or confabulation. Because the record made clear the trial prosecutor's extensive reliance on Stoltzfus' account to establish the key predicates of his entire case against petitioner (*i.e.*, "the alleged abduction" and "the armed robbery"), the district court concluded that "[t]he undisclosed evidence 'put the whole case in such a different light as to undermine confidence in the verdict.' " J.A. 396 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). The court accordingly granted petitioner federal habeas corpus relief.

2. The Fourth Circuit reversed. J.A. 403-34. The Fourth Circuit noted that federal habeas courts generally may not entertain a constitutional claim that has never

been presented to the state courts, and which those courts would *now* refuse to entertain if asked to do so, unless the habeas petitioner establishes "cause" and "prejudice." J.A. 414 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)). The court believed that Virginia courts would now refuse to entertain petitioner's *Brady* claim under a state rule that precludes a "successive" state habeas petition that is based on a claim that was "available" to the applicant when he first sought state habeas relief. *Id.* at 421. According to the court, petitioner's *Brady* claim was "available" to him when he sought state collateral relief, because "reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files * * *." *Ibid.* (citing Virginia Supreme Court Rule 4:1(b)(5), which permits discovery of non-privileged materials but only with prior leave of court).

The court then concluded that petitioner could not show the type of "cause" and "prejudice" needed to excuse his failure to raise the *Brady* claim in state court. Because the claim was "available" to petitioner by filing a discovery motion, the Fourth Circuit reasoned, he could not rely on this Court's cases holding that "cause" is established whenever state officials interfered with a defendant's timely assertion of his claim in state court, or whenever the basis for the claim was not "reasonably available" to counsel during earlier state proceedings. J.A. 422-23. Nor, the court concluded, could petitioner rely on this Court's cases holding that "cause" is established by ineffective assistance of counsel, since "[i]n light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion." *Id.* at 424. In any event, the court stated, petitioner cannot establish "prejudice" because "the Stoltzfus materials would have provided little or no help to" petitioner. *Id.* at 425. The court based that assertion on the fact that, at trial, petitioner "never contested that he abducted and robbed Whitlock" and "argued to the jury during the guilt phase that they

should convict [him] of first degree murder rather than capital murder." *Ibid.* For the same reasons, the court further held, "[e]ven if we could get beyond * * * procedural default, * * * Strickler's *Brady* claim fails on the merits." *Id.* at 425-26, n.11.

SUMMARY OF ARGUMENT

I. The Commonwealth clearly violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1983), by suppressing highly material exculpatory evidence. That evidence was in police files but was not disclosed to the defense. Indeed, even the prosecutor saw the dispositive documents for the first time when they surfaced in petitioner's federal habeas proceeding.

The suppressed materials demonstrate that the Commonwealth's key witness—Anne Stoltzfus, who vividly claimed at trial to have witnessed how the murder victim was forcibly abducted by petitioner and others at a shopping Mall—initially and in a later series of meeting with a police detective: (a) had no memory of the victim's *or* of petitioner's appearance; (b) did not remember even being at the Mall on the relevant date; (c) could give little detail concerning the appearance or clothing of the people involved in the incident she purportedly witnessed; (d) gave inconsistent descriptions of the victim's car; (e) omitted practically every key detail she later invoked in her trial testimony; and suddenly (f) "remembered" a wealth of incriminating detail—and was able to identify the victim—only after meeting for several hours with the victim's boyfriend, with whom she compared notes and reviewed photographs of the deceased. The suppressed materials strongly support the conclusion that Stoltzfus' trial testimony was, in large part or in whole, a complete fabrication embroidered with the help (or at the suggestion) of a law enforcement officer and the victim's boyfriend. Had those materials been disclosed to the defense, they would have furnished a meritorious basis for excluding Stoltzfus' identification testimony in its entirety, or (at

the very least) would have fueled a withering cross-examination exposing the utter unreliability of her testimony.

The materiality of the Commonwealth's violation of *Brady* cannot reasonably be disputed. Stoltzfus ostensibly was a disinterested civilian witness with no stake in the outcome, who at trial claimed to have an "exceptionally good memory" and who delivered detailed, gripping testimony with absolute certainty. Such testimony would leave an indelible impression on *any* jury, and it clearly snuffed out any hope petitioner ever had of fairly defending against the Commonwealth's charges. Because petitioner was indisputably seen in open possesion of the victim's car *after* the murder, Stoltzfus' false testimony that she "absolutely" saw him forcibly break into the car and abduct the victim in it effectively extinguished his defense, reducing every other piece of evidence presented by the Commonwealth to a merely corroborative or interstitial role. Indeed, apart from Stoltzfus there was *no* reliable evidence that petitioner was in the victim's car on the date of the murder *while the victim still lived*, and a jury could have concluded that petitioner acquired the car *after* the killing from co-defendant Henderson and Commonwealth witness Donna Tudor. The materiality of the non-disclosures is particularly obvious with respect to petitioner's death sentence, because Stoltzfus clearly manufactured the factual support for *armed* robbery—the sole remaining predicate for petitioner's capital murder conviction.

II. Petitioner clearly established both "cause" for not raising his *Brady* claim in the state courts and prejudice from the constitutional violation. Because *Brady* already requires a showing of materiality, petitioner's meritorious *Brady* claim establishes that he has suffered the requisite "prejudice." And given the Commonwealth's repeated assertions that it had an "open file" discovery system—*i.e.*, a system wherein all discoverable material is placed in the prosecutor's "file" and made available for inspection by

the accused—petitioner had every right to expect that *Brady* material would be made available in that "open file." Those "open file" assertions by the Commonwealth effectively concealed the existence of petitioner's *Brady* claim, and thus are precisely the type of "external impediments" to the defense that clearly establish "cause" under this Court's cases. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1988).

ARGUMENT

I. THE STATE VIOLATED *BRADY* AND ITS PROGENY BY FAILING TO DISCLOSE EVIDENCE THAT WOULD HAVE DESTROYED THE CREDIBILITY OF A KEY PROSECUTION WITNESS

A. This Court's Cases Clearly Require The Prosecutor To Disclose Any Material Impeachment Evidence Within The Possession Of The Investigating Authorities

As this Court recently noted, "[t]he prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation * * *." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). In cases such as *Mooney v. Holohan*, 294 U.S. 103 (1935), *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Alcorta v. Texas*, 355 U.S. 28 (1957) (*per curiam*), this Court recognized time and again that governmental deception of the court and jury, or knowing suppression of evidence favorable to the accused, was conduct inconsistent with the most "rudimentary demands of justice." *Mooney*, 294 U.S. at 112; *see also Napue v. Illinois*, 360 U.S. 264 (1959). Today, that principle "is of course most prominently associated" (*Kyles*, 514 U.S. at 432) with this Court's landmark decison in *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Brady*, this Court explained that "[t]he principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to

the accused." 373 U.S. at 87.[10] Because suppression of evidence that "would tend to exculpate him or reduce the penalty" results—even when suppression "is 'not the result of guile' "—in a proceeding "that does not comport with standards of justice," the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87-88. And the Court soon made clear that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 269); *see also Moore v. Illinois*, 408 U.S. 786, 794-97 (1972).

After *Brady*, questions persisted about the limits of the government's obligation to reveal favorable information, and the degree to which that obligation might depend upon an affirmative request by a defendant. In *Giles v. Maryland*, 386 U.S. 66, 75 (1967), for example, the Court vacated the defendants' rape convictions, despite absence of any pre-trial request for exculpatory evidence, where evidence that emerged in collateral attack showed that the testimony of the prosecutrix and a purported eyewitness was "open to the construction that these key witnesses deliberately concealed from the judge, jury, and defense counsel evidence of the girl's promiscuity." *Id.* at 75 (plurality opinion); *see also id.* at 102 (Fortas, J., concurring) ("I see no reason to make the result turn on the adventitious circumstance of a request").

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[10] *Brady* involved the suppression of evidence favorable to the accused in the punishment phase of his capital trial, namely the nondisclosure of a codefendant's admission that he, not Brady, had actually killed the victim. *Brady*, 373 U.S. at 87; *see also Alcorta*, 355 U.S. at 32 (finding due process violation where false evidence that was offered at trial precluded an affirmative defense which, if successful, would make death an impermissible punishment).

In *United States v. Agurs*, 427 U.S. 97 (1976), it "became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation." *Kyles*, 514 U.S. at 433; *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988). *Agurs* distinguished between, and assigned increasingly strict standards of materiality to, claims involving knowing use of perjured testimony by the prosecution, failure of the prosecution to honor a specific defense request, and failure to "volunteer exculpatory evidence never requested, or requested only in a general way." *Kyles*, 514 U.S. at 433. Even in the third category—where a general request or no request at all had been made—*Agurs* "found a duty [to disclose] on the part of the Government . . ., though only when suppression of the evidence . . . 'result[ed] in the denial of the defendant's right to a fair trial.' " *Kyles*, 514 U.S. at 433, *quoting Agurs*, 427 U.S. at 108; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) (*Agurs* "held that a prosecutor must disclose unrequested evidence which would create a reasonable doubt of guilt that did not otherwise exist"). Finally, in *United States v. Bagley*, 473 U.S. 667 (1985), this Court "abandoned the distinction between the second and third *Agurs* circumstances." *Kyles*, 514 U.S. at 433. In its place, *Bagley* established a common materiality standard that would apply to all favorable evidence, exculpatory or impeaching, whether the defendant made a specific request, a general request, or no request at all. *Ibid.*

Thus, it is now well estabilshed that "the constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence," rather than by the type of request, if any, submitted by a defendant. *Kyles*, 514 U.S. at 434. Because this Court has entrusted the prosecutor with the responsibility, in the first instance, of assuring compliance with the dictates of *Brady*, each "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's

behalf in the case, including the police." *Id.* at 437. As the Court emphasized in *Kyles*, "whether the prosecutor succeeds or fails in meeting this obligation * * *, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id.* at 437-38.

B. Because The Commonwealth "Suppressed" The Records Reflecting Stoltzfus' Pre-Trial Statements To Detective Claytor, Which Were Clearly "Exculpatory" And "Material," *Brady* Compels A New Trial

The district court correctly concluded that each of the three requirements of the *Brady* rule—exculpation, materiality and suppression—is fully established by the record in this case. Viewed collectively the suppressed materials demonstrate that Stoltzfus—quite probably at the suggestion or urging of police and/or those close to the victim—constructed *post hoc* the testimony she delivered at petitioner's trial, belatedly invented the crucial details necessary to support an inference of armed robbery, and had no original recollection of even being at the Mall on the night Ms. Whitlock disappeared. If disclosed to competent counsel, those materials would have destroyed the credibility of Stoltzfus—a purportedly reliable "eyewitness" who, as far as the jury knew, was testifying solely out of a pristine sense of civic duty. Stoltzfus' multiple asserted observations of the alleged kidnappers, her detailed and vivid account of every facet of the abduction, and the absolute certainty of her in-court identification of petitioner rendered every other item of evidence essentially irrelevant, save for petitioner's undisputed *later* possession of the stolen car. Indeed, in light of petitioner's open possession of the stolen car, Stoltzfus' indelible testimony relegated the balance of the Commonwealth's case to a corroborative, interstitial role. Any jury faced with such testimony from an ostensibly impartial

and unwavering "eyewitness," if told that the defendant had the victim's car and that the victim's violent death occurred in the interim, would likely consider nothing more before connecting the proverbial dots.

1. *Stoltzfus' Pre-Trial Statements Were Exculpatory*

1. "[T]he time-honored process of cross-examination [i]s the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981). By exposing a witness' faulty memory, suggestibility, mendacity, bias, partiality or other motive for testifying, "the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit the witness." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). "[M]aking the jury aware of the inconsistency" between a witness' earlier statements to the authorities and her trial testimony not only is a time-honored means of accomplishing that end, but it also undoubtedly "*enhances* the truth-seeking function of trials and will result in more accurate verdicts." *United States v. Mezzanatto*, 513 U.S. 196, 204-05 (1995) (emphasis in original). And nowhere is such impeachment more crucial to the fairness of the outcome than in cases in which the prosecution relies on identification evidence, because "the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." *Watkins v. Sowders*, 449 U.S. at 347 (emphasis in original).

2. The Stoltzfus materials were clearly exculpatory because they contained evidence crucially relevant to the reliability of Stoltzfus' identification testimony, including evidence suggesting that Det. Claytor (the police investigator) and John Dean (the victim's boyfriend) shaped and manicured Stoltzfus' trial testimony.

Claytor began a series of consultations with Stoltzfus on Friday, January 19, 1990—Claytor and she met twice

that day. In his handwritten notes of the first meeting of the day, Claytor recorded references to a "[c]ar that may have been" in front of her car and to "fighting" somehow associated with it; those notes record that Stoltzfus could *not* identify Whitlock *or* petitioner ("Can't ID B/F 1st W/M"), and reflect virtually *no* descriptive detail next to notations corresponding to "white female" and "second white male." J.A. 306 (Exhibit 1). In an account entitled "Observations" and handwritten by Stoltzfus herself at that interview, she refers to a "[b]lack girl parked in front of" the Mall entrance "in a dark blue 'new' sports car" with West Virginia tags. *Id.* at 311 (Exhibit 3). The "black girl" was joined by a "scroungy 'bum type', 'W. Va hick' with scraggly blondish hair" who pound[ed] impatiently" on the "passenger window" and then opened the door and jumped in. The black girl "start[ed] hitting the guy" and he "back[ed] out." *Id.* He waved to another "girl and guy," who ran toward the car. The driver honk[ed] continuously; then "Guy # 1 + Black girl start[ed] fighting again." *Id.* at 312. Stoltzfus drove past the blue car, but the black girl "just stare[d] straight ahead. Girl in the back seat star[ed] at me." As Stoltzfus "dr[o]ve[] on" to park and "see if the black girl is O.K.[,] * * * [the black girl] dr[o]ve[] the car past me[.] * * *. They look[ed] normal." *Ibid.*

At a second meeting later that day, Stoltzfus reviewed police photo spreads and indicated that one of the white males "[r]esemble[d]" Henderson, but that she was "[n]ot sure." She also stated that a photograph of petitioner "[r]esemble[d]" the other male. J.A. 307. Thus, in a handwritten account and two police interviews given closest in time to the alleged abduction, when her memory of the disturbing events was presumably freshest, Stoltzfus could *not* positively identify *any* of the participants. And, among other things, she did *not* say that: (a) she had written down, much less memorized, the license plate number of the blue car; (b) she had (literally) run into the three

subjects in the Musicland store or otherwise observed them at length earlier; (c) she had a detailed memory of their clothing, including whether such clothing was soiled at the time; (d) in bumping into one of the subjects she felt a "hard" object in his coat, the purported knife with which the victim was later subdued; (e) when the second male and the white female got into the car, the second male passed his coat over the seat to the first white male; (f) she noticed the subjects trying to get into other cars in the parking lot; (g) she got out of her car and approached the girl's car; (h) the girl in the car kept looking down to her right (as if at a knife), or that (i) the girl in the car mouthed the word "help." What Stoltzfus did say, in her own words, was that "[t]hey look[ed] normal."

Claytor interviewed Stoltzfus again on Monday, January 22, 1990. J.A. 307. On that date, Stoltzfus also wrote a letter to Claytor from which it is clear that she had not remembered being in the Mall *at all* during her initial interviews, and had manifested "confusion" to Claytor in her previous meetings with him:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Id. at 313. Stoltzfus apologized to Claytor for her "initial times [being] so far off," explained that she "placed the time around 9:00 p.m. thinking [she] must have not gone in because the Mall was closing," and then said that her new certainty about dates and times was based upon what her daughter and someone at the Mall had told her. *Ibid.* (Exhibit 3). She also recalled visiting Musicland and only *later*, "[o]n the way back from Musicland," seeing a "revved up mountain man" yelling at a

woman that he would meet her at a bus-stop; he "*could* have been the same guy who knocked on the [victim's] car window." *Id.* at 315 (emphasis added). Finally, she related "a very vague memory that [she was not] sure of": "It seem[ed] as if the wild guy that [she] saw" earlier had run up to a bus, missed it, and then approached the blue car. *Id.* at 316. "Were those 2 memories the same person?," she asked Claytor. *Ibid.*[11] This letter continues to reflect deep uncertainty about identification, omits any claim of having carefully observed the subjects such as those she later invoked to bolster her detailed in-court testimony, and still contains no description of the black female—and no mention, much less memory of, any license plate number.

Claytor's files include an undated, typed, document from Stoltzfus entitled "Notes for Det. Claytor: My Impressions of 'The Car' (Anne Stoltzfus)." J.A. 317 (Exhibit 5). Abandoning her previous claim that the blue vehicle had been a "sports" car, she now described it as "a standard boxy American style" and she *thought* "it was a two-door." *Id.* at 318. She had a "*vague impression*" of other details, but she was "not at all sure." *Ibid* (emphasis in original). She did not know the make, though she "remember[ed] looking for [it] and *not being able to see it in the dark.*" *Ibid.* (emphasis added).[12] Stoltzfus again did not mention that she had written down or knew

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[11] In a handwritten post-script, Stoltzfus added that her daughter, who supposedly was with her at the Mall, did not "remember seeing the 3 people get into the black girl's car." *Id.* at 317.

[12] According to Claytor's notes, on January 24, 1990, Stoltzfus was taken to the county impound lot and shown the victim's vehicle, a "Mercury Lynx, W. Va. license NKA-243." J.A. 310-11 (Exhibit 2). Stoltzfus said that "the vehicle looked like the one at the Valley Mall," it "was the right color and size, it had the same little blue stripe down the side, and it had the same colored interior." *Id.* at 311.

the vehicle's license plate number, or that she had any specific memory about the car's driver.

That began to change with Stoltzfus' handwritten note to Claytor dated January 25, 1990, at 1:45 a.m. She then stated that she had "identified' beyond a shadow of a doubt that the black girl I saw 1/5/90 was LeAnn Whitlock." J.A. 318 (Exhibit 6). Stoltzfus' note said she had "spent several hours" with the victim's boyfriend, John Dean, looking at his photographs of Ms. Whitlock "from which [she] made the identification." *Ibid.* An additional comment in the note, comparing Dean's description of a "girl in jail" with Stoltzfus' own recollection, also indicates that Stoltzfus and Dean spent some time that evening exchanging impressions about the evidence so far developed by the authorities. *Ibid.* Later that day, Claytor wrote in a report that Stoltzfus had—"without a doubt"—identified Whitlock as the person she had seen "operating the blue vehicle." He added that she had also identified the victim's car and had "advised" that "[s]he had made up a quote to help remember the license number after the incident. 'No Kids After 2-43.'" *Id.* at 311. That was the *first* time Stoltzfus ever mentioned the license plate number.

Stoltzfus' extended visit with the victim's boyfriend unleashed a veritable torrent of additional—and highly incriminating—"memories" that Stoltzfus duly conveyed in additional missives to Claytor. By letter dated January 26th, Stoltzfus for the first time advised Claytor of: (a) the events at Musicland, including her brush with the "dark-haired quiet guy" and his "long tan light-weight coat"; (b) descriptions of the subjects' clothing and of purported conversations amongst them; (c) a detailed description of the blonde woman, and (d) that Stoltzfus had witnessed a crime. J.A. 319-22 (Exhibit 7). Stoltzfus thanked Claytor for his "patience with [her] sometimes muddled memories," and stated that but for Claytor's inter-

vention she "never would have made any of the associations that [he] helped [her] make." *Id.* at 321.

A later three-page, undated memorandum from Stoltzfus, entitled "Details of Encounter With Mountain Man, Shy Guy & Blonde Girl," expounds in still greater, vivid detail about the events of January 5th. It is in that memorandum that Stoltzfus sets forth for the first time numerous additional facts about the abduction, including (a) the passing of the tan coat from the occupants of the back seat to "Mountain Man"; (b) the fact that the victim "would meet [Stoltzfus'] eyes and then purposefully look down to her right side"; and (c) the fact that the victim "mouthed 'Help.'" It is the version of Stoltzfus' story that comes closer than any of her previous attempts to the chilling version of the abduction she later related at trial. J.A. 322-27 (Exhibit 8).

3. The circumstances surrounding the development of Stoltzfus' story tellingly expose the deception that she practiced on the court and jury that convicted petitioner. Indeed, even a brief comparison of portions of Stoltzfus' trial testimony to her initial statements in the undisclosed documents illustrates the unreliability of her testimony and demonstrates why a jury would never credit her account after a proper cross-examination.

TRIAL TESTIMONY	WITHHELD DOCUMENTS
"I have an exceptionally good memory."	"I have a very vague memory that I'm not sure of." Exh. 4 at 3.
Asked if at the time she first spoke to the police she told them what she "just told" the jury, Stoltzfus said, "I told the police exactly what I saw, right."	After the first 3 interviews, Stoltzfus wrote "to clarify some of [her] confusion," stating that she (a) did not remember being at the mall, (b) did not remember going inside the mall, and (c) thought she was there around 9:00, after closing time. Exh. 4.

Stoltzfus thanks Claytor for his "patience with [her] sometimes muddled memories." States that she "didn't believe [a crime was] what I saw until I saw LeAnn's pictures" at John Dean's. Tells Claytor that, left to her own devices, she "never would have made any of the associations that you helped me make." Exh. 7.

When first interviewed by Claytor, she "gave detailed descriptions of the three persons."

Notes of first interview state: "Can't ID B/F 1st W/M." Those notes contain no description of physical features or clothing of black female or first white male. Stoltzfus states that photo of Henderson "resembles" one suspect but that she is "not sure." She also states that photo of petitioner "resemble" (sic) suspect." She describes second white male as "tall" with "dark hair" and "cream jacket." States "Can ID W/F" who was "5'05"—140 (Little over weight)" wearing "blue jean" with "brown hair shoulder" "plain face (pail) [sic]." Exh. 1.

"I was very sure of the two white men I was shown," that she picked them "with absolute certainty," and had a "slight reservation" about the white woman.

"I was shown 'Mountain Man' on Friday afternoon and I was one hundred percent sure . . ." "I have absolutely no doubt of my identification."

She describes man who approached car as "[s]croungy 'bum-type", "W.Va. hick" with long scraggly blondish hair." No mention of clothing or other physical features of first white male. Exh. 3 at ¶ 1.

Stoltzfus told the jury she "[a]bsolutely" got a good look at the black woman she saw drive pass her and who was then abducted. She described the woman as a "rich college kid,"

Claytor's notes state that Stoltzfus "can't ID B/F." She did not describe her clothing. Exh. 1.

Stoltzfus wrote that she "spent several hours with John Dean [the victim's boyfriend'] looking

"beautiful," "well dressed," "happy," "singing," and "bright eyed."

Stoltzfus testified that she followed the car, told her daughter to write the license plate number on a 3×4 index card, and used the trick "No Kids Alone 243" to remember the number.

at current photos from which I made the identification [of victim]." Exhh. 6.

Claytor's notes of first interview contain no mention of license number, state of registration, or daughter recording number. Exh. 1.

Stoltzfus' own handwritten "observations" describe a " 'new' sports car" and omit license plate number, trick for recalling it, and daughter's recording number on a card. Exh. 3.

Letter of 1/22/90 states only that car was "dark blue" with "West VA tags" and omits license plate number, trick for recalling it, and daughter's recording plate number. Exh. 4.

In undated "My Impressions of 'The Car,' " the car was "dark blue (navy) and shiny" and "a standard boxy American style." She relates "*vague impressions*" and features she "*think*[*s*]" it had but is "not at all sure." No mention of license plate or number. Exh. 5.

Two days after Claytor showed Stoltzfus the car, and one day after spending several hours with its owner viewing pictures of the victim, she "remembered the license number" which she previously "could block out." Exh. 7 at 1.

Stoltzfus stated that she first saw the man she identified as petitioner when she entered the Musicland store. She gave a

Initial interviews with Claytor make no reference to Musicland or to any encounter with the suspects there. Exhs. 1, 3.

detailed description of what she said Strickler was wearing and identified a shirt (CW Ex. 7) as like the one she saw. Asked if she "g[ot] a good look at both of [the males]" at the time of the first encounter in the record store, Stoltzfus testified, "Oh, yes, I certainly did." She described one of the men as "revved up" and impatient. She testified that she tried to follow the "Mountain Man" but "lost" him.

Letter to Claytor of 1/22/90 described time spent in Musicland ("Wasted 10-20 min. trying to get help to find the CD") but does not mention encounter with three people. Only mentioned seeing "mountain man" "[o]n the way back to Musicland the 2nd time." Thinks she remembers seeing "the wild guy" run up to a bus then to the black girl's window." Asks, "were those 2 memories the same person?" Also states that daughter did not remember "seeing the 3 people get into the black girl's car." Exh. 4.

4. In sum, the Stoltzfus documents starkly reveal "the evolution over time of [her] description" (*Kyles*, 514 U.S. at 444) and her increasing ability to "remember" incriminating details with each meeting with Claytor, who was familiar with the investigation and was clearly in a position to suggest what details might be useful for Stoltzfus to "remember." They also reveal how she underwent an amazing epiphany following a meeting of "several hours" with the victim's boyfriend, comparing notes and "looking at current photos from which [she] made [her] identification of the victim." Indeed, the undisclosed documents reveal that Stoltzfus' testimony not only evolved to fit nearly seamlessly with the circumstantial testimony of other Commonwealth witnesses—such as a security employee of the Mall who believed she had seen petitioner there earlier in the afternoon of January 5th, J.A. 28—but that her testimony was tailor-made to support the armed robbery and abduction predicates required for petitioner's capital conviction. Once disclosed, those materials would have supported a meritorious motion to exclude Stoltzfus' identification testimony as wholly unreliable, *see, e.g., Manson v. Brathwaite*, 432 U.S. 98, 114-17

(1977), or, at the very least, "would have fueled a withering cross-examination, destroying confidence in [her] story and raising a substantial implication that the [authorities] had coached [her] to give it." *Kyles*, 514 U.S. at 443 (footnote omitted). It cannot be doubted that those materials were therefore clearly "exculpatory" within the meaning of *Brady*.

2. *Stoltzfus' Pre-Trial Statements Were Material*

It is beyond dispute that "evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433-34 (citation omitted). It is equally clear that "materiality * * * is not a sufficiency of the evidence test," and thus "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. As in other contexts in which courts are called upon to assess how a jury may have been affected by a deviation from legal norms, the materiality determination must be consistent with the Sixth Amendment, which secures to criminal defendants the right to trial by jury. "Th[is] right includes, of course, as its most important element, the right to have a jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (discussing Sixth Amendment constraints on harmless error review); *see also California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring) (same). In view of that constitutional constraint, what the materiality standard demands is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. That is undoubtedly true here.

1. Any assessment of the materiality of the Stoltzfus documents must begin with, and bear in mind throughout, the almost incomparable impression that an unhesitant in-court identification by an unbiased eyewitness will naturally have upon a jury. Without hesitation, Stoltzfus testified in great detail to her multiple contacts with the alleged kidnappers "close-up and with the sun high in the sky" (*Kyles*, 514 U.S. at 466 (Scalia, J., dissenting)), even *before* the abduction allegedly occurred that evening. She thus gave the jury a basis—flawed, as it turns out—for believing that Stoltzfus' observations were careful and most unlikely to be wrong. She also quite distinctly—and falsely—conveyed to the jury that she had told a consistent story from the beginning, including that she was "one hundred percent sure" (J.A. 56) of her identification of petitioner from police photographs on the very *first* day she was interviewed by the authorities. With the exception of a full confession or a videotape of the crime, it is difficult to conceive of evidence to which a jury would be more likely to give credence than the type of account by a purportedly disinterested witness that Stoltzfus placed before the jury. Here, as with a full confession, a jury "doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case." *Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring in judgment).

That is especially true here because the Commonwealth had little evidence of petitioner's guilt that could fairly be said to be *independent* of, or otherwise unaffected by, Stoltzfus' gripping account. Quite simply, the Commonwealth had *no* reliable evidence, apart from Stoltzfus, that petitioner was in the blue car *at all* on January 5th while Ms. Whitlock still lived. For that reason, Stoltzfus' account was the starting—and the most compelling—premise of the Commonwealth's entire evidentiary presentation. If the jury credited Stoltzfus' vivid account of the abduction (and the separate jury verdicts finding petitioner

guilty of abduction and unarmed robbery show that it did), it is inconceivable that the jury would not find him guilty of killing Ms. Whitlock based solely on his later possession of the victim's stolen car. Conversely, excluding (or, at least, deeply discounting) Stoltzfus' testimony would leave the jury with a circumstantial case primarily centering on petitioner's acquaintanceship with Henderson and on inconclusive physical evidence—and with the need to consider the implications of Stoltzfus' coached testimony for the integrity of the entire investigation. *Kyles*, 514 U.S. at 445. The incriminating testimony of Donna Tudor, who (a jury could easily conclude) in all likelihood was herself an accomplice in the Whitlock killing and one of the persons from whom petitioner probably obtained the car, could not make up the credibility deficit of that circumstantial case. That point was not lost on the prosecutor when, in summation, he emphasized Stoltzfus' testimony at the outset and throughout as one of the givens in the case—or when, at Henderson's later trial, he dispensed entirely with Tudor (but not Stoltzfus) as a witness.[13]

2. As plain as the materiality issue is with respect to the guilt phase, materiality is even more devastatingly clear with respect to punishment. Petitioner was con-

[13] Much of the evidence pointed directly to Henderson, rather than petitioner, as the murderer. Henderson's wallet, and a significant quantity of Caucasian hair that could not have originated from petitioner, were found near the body. J.A. 87, 137. On the night of the murder, Henderson told a friend, Workman, that he had killed someone, whom he described with a racial epithet. Workman saw blood on Henderson's clothes. *Id.* at 139. On the night of Ms. Whitlock's disappearance, Henderson (not petitioner) gave her watch to a woman in a bar. *Id.* at 82. Blood was found on Henderson's jacket and his jeans had substantial, visible blood stains. *Id.* at 139. A jury unexposed to Stoltzfus' unreliable identifications (or apprised of the high likelihood that her account resulted from suggestion or confabulation) could well conclude that petitioner acquired use of the victim's car, from Henderson or Tudor, *after* the killing.

victed of capital murder on the basis of two predicate crimes, *armed* robbery and abduction with intent to extort or defile. The Virginia Supreme Court held on petitioner's state habeas (and indeed the Commonwealth conceded on state collateral review, J.A. 218) that abduction "with intent to defile" could not legally serve as a predicate for capital murder, because the victim in this case was over the age of 12. Petitioner's capital murder conviction thus must be supported, if at all, on the basis of compelling evidence of *armed* robbery.

The prosecutor's "evidence" of that predicate, however, flowed almost entirely from inferences from Stoltzfus' testimony, particularly her late-blooming recollections of a hard object in "Shy Guy's" coat, the passage of that coat to "Mountain Man" in the front seat (after which the intruders were able to "relax," J.A. 45), and the victim's purported glances to the right. As the prosecutor argued in summation:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. That was pressed right up against Leanne * * *. Mrs. Stoltzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

J.A. 170.[14] Indeed, even if the capital murder conviction could be supported (and it cannot), it is more than rea-

[14] In affirming the denial of state habeas relief, the Supreme Court of Virginia concluded that evidence that Ms. Whitlock's murderer used a *rock* to inflict death was sufficient to establish armed robbery under Virginia law. That theory cannot support petitioner's capital murder conviction, because the theory that the prosecutor actually presented to the jury relied on the presence of a *knife* during the

sonably probable that the devastating impeachment of Stoltzfus' testimony would be sufficient to cause the jury to choose a penalty other than death, especially since it was her testimony—and her testimony *alone*—that portrayed petitioner as the instigator and violent leader in the abduction and armed robbery of Ms. Whitlock, and, by inference, the leader in her murder. It is impossible to say, in these circumstances, that the suppressed documents were not material under *Brady*.

3. The court of appeals nonetheless believed that a different conclusion as to materiality was warranted by its examination of the particular strategy pursued by defense counsel at petitioner's trial. In the Fourth Circuit's view, the Stoltzfus documents could not be considered "material" because petitioner "never contested that he abducted and robbed Whitlock" but argued that the jury should convict him of first-degree, rather than capital, murder. J.A. 425. That analysis fundamentally misconceives *Brady* and its

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abduction, not on the later use of a rock. Under the Sixth Amendment and the Due Process Clause, "appellate courts are not free to revise the basis on which a defendant is convicted." *Dunn v. United States*, 442 U.S. 100, 106-07 (1979); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980) ("we cannot affirm a criminal conviction on the basis of a theory not presented to the jury"). In any event, the "rock" theory in no sense is independent of Stoltzfus' account of the abduction.

Indeed, even if the Commonwealth *had* argued the "rock" theory of robbery to the jury, petitioner's capital murder conviction still could not stand in view of the Virginia Supreme Court's conclusion that the abduction predicate was legally unsound. The jury was told that it could convict petitioner of capital murder on that legally unsound ground, and the prosecutor argued that ground to the jury. J.A. 165. "For all we know, the conviction did rest on that ground," *Leary v. United States*, 395 U.S. 6, 31 (1969), and it is thus insupportable irrespective of *any* factual basis that might exist for the alternative robbery predicate. *Ibid.*; *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error").

progeny. As this Court has recognized, a prosecutor's non-compliance with his *Brady* obligations inherently affects the composition of the trial record, because it shapes the "pretrial and trial decisions" made by defense counsel. *Bagley*, 473 U.S. at 682-83 (plurality opinion). For that reason, "the constitutional duty [to disclose] is triggered by the *potential* impact of favorable but undisclosed evidence," *Kyles*, 514 U.S. at 434 (emphasis added), not by a retrospective examination of how defense counsel were forced to try the case in the *absence* of the exculpatory evidence.

3. *Stoltzfus' Pre-Trial Statements Were Suppressed*

It is conceded that the vast majority of the Stoltzfus records—five out of eight exhibits—were suppressed by the Commonwealth. Indeed, the prosecutor claimed to have seen them for the very first time when they were produced from Det. Claytor's file in response to a federal subpoena. J.A. 365-68. Those concededly withheld documents include Claytor's handwritten notes of his initial meetings with Stoltzfus on January 19th (Exhibit 1; reflecting, *inter alia*, her inability to identify petitioner or the victim); Stoltzfus' handwritten "observations" (Exhibit 3; reflecting, *inter alia*, very little of the incriminating detail she later conveyed to the jury and stating "[t]hey look[ed] normal"); Stoltzfus' January 22nd letter seeking to clarify her "confusion" (Exhibit 4; noting, *inter alia*, that she had not remembered being in the Mall at all, and expressing doubt that "Mountain Man" and "wild guy" she later saw enter the blue car were "the same person"); Stoltzfus' undated "Impressions of the Car" (Exhibit 5; reflecting, *inter alia*, her memory change from "sports" car to a "standard boxy American" car and her lack of awareness of its license plate number); and Stoltzfus' January 25th note to Claytor following her meeting of "several hours" with the victim's boyfriend (Exhibit 6; reflecting, *inter alia*, that Stoltzfus identified the victim after extensive

exposure to her photographs). As the district court correctly concluded, suppression of those documents more than suffices to warrant relief under *Brady*.[15]

C. *Brady* Relief Is Not Limited To Defendants Who Exercise "Diligence" By Refusing To Take The Prosecutor At His Word

The court of appeals also suggested that petitioner's *Brady* claim must fail because he did not seek to compel production of *Brady* materials through legal process. J.A. 421. While that ruling was based on procedural default principles (and is addressed below), the court also appeared to believe that similar considerations might apply to the merits of a *Brady* claim. *Id.* at 425, n.11. There is no room for that sort of "diligence" inquiry under traditional *Brady* principles.

1. The law is clear that "diligence" in filing a motion in court is not an independent requirement of *Brady* and and its progeny. That is the inescapable conclusion from this Court's decision in *Bagley*, which clearly discarded any notion that the accused must "request" exculpatory

[15] In the district court, petitioner submitted affidavits supporting his additional claim (disputed by the prosecutor) that the Commonwealth also suppressed three more documents, Exhibits 2, 7, and 8. Exhibits 7 and 8 are, respectively, Stoltzfus' January 26th letter to Claytor and her subsequent memorandum reflecting for the first time a large number of the incriminating details that she related at trial; they are the last two documents she prepared. Exhibit 2 is a compendium of Claytor's typewritten notes reflecting his investigative steps, including his interviews of Stoltzfus, beginning on January 19, 1990. The district court determined that any dispute concerning the suppression of those three items could not affect petitioner's entitlement to relief. J.A. 392. Even if those three documents had been disclosed (they were not), the concededly suppressed documents—by dramatically illustrating Stoltzfus' early lack of memory and the progression of her testimony that resulted from repeated contact with the investigator—would have cast those three exhibits in a dramatically different light. *Compare Kyles*, 514 U.S. at 443-44, n.14.

evidence in the first place. *Kyles*, 514 U.S. at 433-34. If the doctrine does not even require that the defendant *ask* the prosecutor, it can scarcely be interpreted to require the filing of a formal motion in court. Still less can *Brady* be interpreted to require such a course when, as here, prosecutors have represented that they will provide "open file" discovery. Because this Court's cases clearly place on "the individual prosecutor [the] duty to learn of any favorable evidence known to others acting on the government's behalf in the case," *Kyles*, 514 U.S. at 437, and because this Court's cases presume "that the great majority of prosecutors will be faithful to their duty," *Mezzanatto*, 513 U.S. at 210, any lower court presented with a *Brady* motion in such circumstances would grant no further relief than access to the "open file" that the prosecutor offers in purported satisfaction of his discovery obligations—as the reported cases attest.[16]

2. In fact, adoption of any "diligence" precondition to disclosure would be inconsistent with the development of *Brady* law, which has sought to simplify the rules governing administration of the government's disclosure obligations in a manner that minimizes excuses for nondisclosure while encouraging systemic compliance within and among prosecuting agencies. Like the plea, rejected in *Kyles*,

[16] *United States v. Upton*, 856 F. Supp. 727, 746 (E.D.N.Y. 1994) ("To the extent that the government represents that it 'has produced every document in its possession which relate in any way to this case' * * *, the court must assume the veracity of that representation. The alternative to such an assumption would require the court to examine numerous file drawers of documents to verify that representation which is as obviously undesirable as it is impractical"); *United States v. Firmin*, 589 F. Supp. 828, 829 (M.D. Pa. 1984) ("[T]he government contends that it has provided open file discovery. If any *Brady* materials are later determined to have been withheld by the prosecution, defendant may pursue appropriate remedies"); *Knox v. State*, 532 N.W.2d 149, 153 (Iowa App. 1995) ("The defense attorney and the trial court had a right to rely on the testimony of the State's attorney that all information about the print had been turned over to Knox").

that prosecutors be relieved of responsibility for disclosing evidence known only to the police, the introduction of a requirement that defendants satisfy a "reasonable diligence" standard as a precondition for exercising or enforcing the *Brady* rule "would * * * amount to a serious change of course from the *Brady* line of cases." *Kyles*, 514 U.S. at 438.

Moreover, a "diligence" requirement is unworkable in the context of a doctrine, like *Brady*, that depends in the first instance on prosecutorial judgments about the value of evidence. In many cases, a prosecutor's ability to determine whether or not a particular item of favorable evidence is available to defense counsel through the exercise of reasonable diligence will require information which the current system does not entitle the prosecutor to obtain, such as knowledge of what expert assistance an indigent defendant has been authorized to retain, or how witnesses have reacted to being approached by a defense investigator. Thus, without a corresponding requirement—unprecedented in American criminal procedure—that a defendant provide ongoing disclosure of how his defense is developing, the prosecutor would be utterly unable to gauge when his obligation to disclose favorable information has been triggered. Nothing in this Court's cases requires the injection of that additional complexity into *Brady* doctrine.[17]

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[17] Whether a criminal defendant has been "diligent" in *using* information that has actually been *disclosed* may be relevant to related doctrinal areas, particularly to an assessment of counsel's performance under *Strickland v. Washington*, 466 U.S. 668 (1984). That inquiry, however, has no independent role to play under *Brady*.

II. PETITIONER CLEARLY ESTABLISHED BOTH "CAUSE" FOR FAILING TO PRESENT HIS *BRADY* CLAIM TO THE STATE COURTS AND ACTUAL "PREJUDICE" FROM THE COMMONWEALTH'S VIOLATION OF *BRADY*

Petitioner never presented to the state courts his claim that the Commonwealth violated *Brady* by suppressing the Stoltzfus materials, and that claim is therefore procedurally barred.[18] Accordingly, under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny petitioner must demonstrate "cause" for his failure to raise the claim in the state courts "and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989). As the district court correctly concluded, petitioner has made that showing.

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[18] Although a habeas petitioner ordinarily must "exhaust" his state remedies by presenting his claims to the state courts in the first instance, *see* 28 U.S.C. 2254(b), exhaustion is not an issue in this case because that requirement "refers only to remedies still available at the time of the federal petition." *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (quoting *Engle v. Isaac*, 456 U.S. 107, 126, n.28 (1982)); *see also Castille v. Peoples*, 489 U.S. 346, 351 (1989). The court of appeals concluded that the Virginia courts would today refuse to entertain petitioner's *Brady* claim, and petitioner agrees with that conclusion. Petitioner does *not*, however, agree with the *reasons* for it cited by the court of appeals, *viz.*, that court's view that any application that petitioner might file today in the Virginia courts would be a "successive petition" based on grounds that were "available to him" when he first sought state habeas corpus. J.A. 414 (citing Va. Code Ann. § 8.01-654(B)(2)). Virginia courts would not hear the new *Brady* claim because, as a result of an intervening change in state law, any petition to the state courts would be found time-barred. *See* Va. Code Ann. § 8.01-654.1.

A. The Commonwealth's Repeated Nondisclosure And Repeated Misrepresentations That Its "Open File" Contained All *Brady* Material Constitutes "Cause" For Petitioner's Failure To Raise The *Brady* Claim In State Proceedings

1. This Court has defined "cause" as something "*external* to the petitioner, something that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753 (emphasis in original). Thus "the existence of cause * * * must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Ibid. (quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Amadeo v. Zant*, 486 U.S. 214, 222 (1988). That external factor may consist of "a showing that the factual or legal basis for a claim was not reasonably available to counsel," or a demonstration that " 'some interference by officials' * * * made compliance impracticable." *Coleman*, 501 U.S. at 753 (*quoting Carrier*, 477 U.S. at 488); *see also McCleskey v. Zant*, 499 U.S. 467, 497 (1991) ("external impediment, whether it be government interference *or* the reasonable unavailability of the factual basis for the claim") (emphasis added). As the Court noted in holding that the utter legal novelty of a claim constitutes "cause" for failing to raise it sooner, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the ["cause"] requirement is met. If counsel has no reasonable basis upon which to formulate a constitutional question * * * it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort." *Reed v. Ross*, 468 U.S. 1, 14-15 (1984).

This case fits squarely within both aspects of this "external" understanding of cause, because not only was the factual basis of the *Brady* claim unavailable to defense counsel, but the *reason* for the unavailability of the claim was the Commonwealth's misleading conduct. At trial,

the Commonwealth's attorney maintained that he had an "open file" policy with respect to materials properly discoverable by the defense, a point noted by the Supreme Court of Virginia in its opinion on direct appeal. *Strickler v. Commonwealth*, 404 S.E.2d at 233 (noting that petitioner received all the discovery to which he was entitled). In state habeas corpus proceedings, the Attorney General affirmatively represented to the court and petitioner's counsel that petitioner received all *Brady* material through the prosecutor's open file policy. J.A. 212-13. In fact, however, the Commonwealth never produced the plainly exculpatory Stoltzfus materials until faced with a federal subpoena in the federal habeas corpus proceedings. The actions of the Commonwealth in inviting reliance on the purported discharge of its constitutional discovery obligations through its "open file" policy amount to concealment pure and simple. And, as this Court noted in *Amadeo, supra*, "if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the [claim] * * * then petitioner established ample cause to excuse his procedural default under this Court's precedents." 486 U.S. at 222; *see also McCleskey*, 499 U.S. at 501 (finding that petitioner had not established "cause" because there was "no misrepresentation or wrongful conduct by the State in failing to hand over the document earlier").

2. The court of appeals faulted petitioner, however, for failing to seek discovery in the state habeas corpus proceedings, and thus failing to obtain the Stoltzfus materials earlier. The court believed that such discovery would have been sought by any "reasonably competent counsel." J.A. 421. The Stoltzfus materials, however, comprise precisely the sort of investigative reports and correspondence generally viewed as privileged, and thus nondiscoverable, under Virginia law. *See* Va. S. Ct. Rule 3A:11(b)(2) (exempting from discovery by criminal defendants any police reports and any "statements made by Commonwealth witnesses or prospective Commonwealth

witnesses").[19] And even if the Stoltzfus materials had not been protected by privilege, petitioner would have been unable to obtain discovery in state habeas, which is permitted only with "leave of court" (Va. S. Ct. Rule 4:1 (b)(5)) and upon "a showing of some special circumstances in addition to relevancy." *Rakes v. Fulcher*, 172 S.E.2d 751, 756 (Va. 1970) (noting that "[t]he mere suspicion that [a witness] ha[s] made inconsistent and incomplete statements is not a showing of good cause") *see also Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995). There is no reasonable likelihood that such a discovery motion in state habeas would have produced anything other than the Commonwealth's stock assurance that, by providing "open file" discovery, it had already fully complied with its obligations under the Constitution. Indeed, we *know* that any motion to the Virginia courts would have been unsuccessful because on *direct* review the Supreme Court of Virginia *treated petitioner's other claims as though he had in fact made such a discovery motion*, and expressly concluded that "petitioner had the benefit of all the discovery to which he was entitled under the Rules." *Strickler*, 404 S.E.2d at 233.[20]

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[19] *See also* Va. Code Ann. § 2.1-342(b)(1) (exempting from state FOIA disclosure "[m]emoranda, correspondence, evidence and complaints related to criminal investigations; * * *; reports submitted to the state and local police * * * in confidence"); *Rosser v. Commonwealth*, 482 S.E.2d 83, 87 (Va. App. 1997) (in light of Rule 3A:11(b)(2), trial court correctly "instructed appellant that the requested records could not be obtained with a subpoena duces tecum").

[20] The Supreme Court of Virginia's express avowal that petitioner in fact had the benefit of *all* discovery that might be available to an accused under its Rules is significant for one additional reason. It demonstrates that the Supreme Court of Virginia accords to the filing of a formal discovery motion far less significance than does the Fourth Circuit. It would indeed be anomalous to permit the Fourth Circuit to enforce Virginia's discovery rules more strictly than Virginia itself does.

Moreover, the comity and federalism policies that underlie this Court's procedural default jurisprudence would be decidedly ill-served by a rule requiring criminal defendants to deluge state courts with speculative discovery motions, solely to preserve their federal rights for later review in the presumably rare cases in which state prosecutors turn out not to have been "faithful to their duty." *Mezzanatto*, 513 U.S. at 210. As the Court observed in *Reed*, that is precisely the sort of rule that "might actually disrupt state-court proceedings by encouraging defense counsel to [present to the state courts] any and all remotely plausible * * * claims that could, some day, gain recognition." *Reed*, 468 U.S. at 15-16. Here as elsewhere, it makes far more sense to craft background procedural rules on the assumption that public officers " 'have properly discharged their official duties.' " *Mezzanatto*, 513 U.S. at 210 (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Indeed, the appropriateness of that approach necessarily is at its acme where, as here, this Court already made the judgment of entrusting enforcement of the underlying norm (*Brady*) to prosecutors rather than courts in the first instance.

3. In any event, it is well settled that a habeas petitioner establishes "cause" by showing, under *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel were ineffective. Petitioner submits that the court of appeals' treatment of that issue cannot withstand scrutiny. If, as the court of appeals believed, any reasonably competent defense counsel would have sought *Brady* materials from the state courts by motion, then petitioner's trial counsel assuredly were constitutionally ineffective in failing to make such a motion. That professional failure clearly prejudiced petitioner by depriving him of key exculpatory evidence and plainly establishes "cause," as the district court alternatively found. J.A. 276. Yet the court of appeals rejected that alternative finding of "cause" on the stated ground that, *in light of the open file policy*, "trial counsel were under no obligation to file a *Brady*

motion." *Id.* at 424. Indeed, the court cited approvingly to *Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir. 1983), for the proposition that " '[c]ounsel had no duty to file pre-trial motions, because the prosecutor established an open file policy that made filing of discovery motions or *Brady* requests pointless.' " J.A. 424. The Fourth Circuit did not explain, nor is it apparent, how that line of analysis can possibly be squared with its ruling that petitioner's constitutional claims were irretrievably lost *precisely* because he failed to file such a "pointless" motion.

B. Petitioner Was Clearly Prejudiced By The Commonwealth's Nondisclosure Of *Brady* Materials

The record in this case also leaves no doubt that petitioner has established "actual prejudice as a result of the * * * violation of federal law." *Coleman*, 501 U.S. at 750. While this Court has never given the prejudice standard "precise content," *United States v. Frady*, 456 U.S. 152, 168 (1982), it has required a showing that the constitutional error "worked to [the petitioner's] *actual* and substantial disadvantage." *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (*quoting Frady*, 456 U.S. at 170) (emphasis in original). Such a showing is inherent in the nature of the violation where, as here, the underlying norm (*Brady*) already requires a showing of materiality, defined as " 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles*, 514 U.S. at 433-34 (*quoting Bagley*, 473 U.S. at 682). Indeed, this Court's cases have repeatedly cited to *Bagley* (and to *Strickland*'s standard of prejudice, from which the *Bagley* standard was derived) as reflecting what showing is sufficient to establish "prejudice" for any alleged procedural bar. *See Schlup v. Delo*, 513 U.S. 298, 327 & n.45 (1995) (recognizing that proof of materiality under *Bagley* is sufficient "to establish prejudice" excusing a procedural default); *id.* at 333 (O'Connor, J., concurring) (same);

see also Sawyer v. Whitley, 505 U.S. 333, 345 (1992) (equating "prejudice" with *Bagley* materiality standard).

Indeed, as the Court noted in *Kyles*, a determination of materiality "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the verdict.' " *Kyles*, 514 U.S. at 435 (citations omitted). Where, as here, that "substantial and injurious effect" produced a manifestly unreliable capital verdict and death sentence, it assuredly worked to petitioner's "*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. at 170 (emphasis in original).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

In the following chart, pertinent facts are listed along the left-hand column. For example, was Stoltzfus at the mall at all? Did Stoltzfus see Ms. Whitlock "singing"? Did she feel a hard object under a coat? Did she know the license tag number? The boxes across the top designate the sequence of statements made by Stoltzfus. The chart illustrates whether Stoltzfus included certain "facts" in her series of statements.

	1/19 Notes	Observations 1/19	1/22 letter	Viewed car (1/24)	Met with boyfriend (1/25)	1/26 letter	"Details"
At Mall?			admits she did not remember earlier	Yes		Yes	Yes
Can I/D B/F?	No[1]	No	No		Yes	Yes	Yes
Singing?	No	No	No			No	Yes
Can I/D 1st W/M?	Maybe	No	No			"should be able"	No
ID car?	No	No	No	"looked like" it	No	Yes	Yes
License #	No	No	No	No	No	Yes	Yes
Encounter in Musicland	No	No	No			Yes	Yes
Saw in Mall?	Maybe	No	Yes			Yes	Yes
Weapon in coat?	No	No	No			No[2]	Yes

1 "No" entry on this chart indicates that in the document under which the entry appears Stoltzfus either omitted the factual question listed in the left column or the document contains a negative answer to the question.

Got out of car?[3]	No	No	No			No	Yes
Confused or bad memory?			confused[4]			Yes[5]	No
Need help making associations?			Yes[6]			Yes[7]	No

[Footnote continued from previous page]

2 Stoltzfus' tactile description of the coat omits the "fact" that she felt a hard object under it: "My entire left arm brushed a long tan light-weight coat of synthetic fabric that was draped over his right arm."

3 This refers to the "fact" that Stoltzfus got out of her car, in traffic, to approach the girl's car to see if she was all right.

4 "Were these two memories of the same person?"; "I want to clarify some of my confusion for you."

5 Stoltzfus thanked Claytor for his "patience with my sometimes muddled memory." She also stated that "I know that if I believed at the time that I was witnessing a crime I would have much, much more vivid memories."

6 Daughter "remembers different things and her sharing with me what she remembers helped jog my memory."

7 Stoltzfus told Claytor "I never would have made any of the associations that you helped me make."

APPENDIX B

The Rules of the Supreme Court of Virginia provide, in pertinent part:

Rule 4:1. General Provisions Governing Discovery.

(a) *Discovery Methods.*—Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Scope of Discovery.*—Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subject to the provisions of Rule 4:8(g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is

unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).

* * * *

(5) Limitations on Discovery in Certain Proceedings. In any proceeding (1) for separate maintenance, divorce, or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

Rule 3A:11. Discovery and Inspection.

(a) *Application of Rule.*—This Rule applies only to prosecution for a felony in a circuit court.

(b) *Discovery by the Accused.*—(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for

the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

The Virginia Code Annotated provides, in pertinent part:

§ 2.1-342. Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter.— A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens * * *.

* * * *

B. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of such photograph will no longer jeopardize the investigation; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; records of local police departments relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such departments under a promise of confidentiality; and all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of this chapter.

Criminal incident information relating to felony offenses shall not be excluded from the provisions of this chapter; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

* * * *

§ 15.2-1722. Certain records to be kept by sheriffs and chiefs of police.—A. It shall be the duty of the sheriff or chief of police of every locality to insure, in addition

to other records required by law, the maintenance of adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency. Failure of a sheriff or a chief of police to maintain such records or failure to relinquish such records to his successor in office shall constitute a misdemeanor. Former sheriffs or chiefs of police shall be allowed access to such files for preparation of a defense in any suit or action arising from the performance of their official duties as sheriff or chief of police. The enforcement of this section shall be the duty of the attorney for the Commonwealth of the county or city wherein the violation occurs. Except for information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, the records required to be maintained by this section shall be exempt from the provisions of Chapter 21 (§ 2.1-340 et seq.) of Title 2.1.

B. For purposes of this section, the following definitions shall apply:

"Arrest records" mean a compilation of information, centrally maintained in law-enforcement custody, of any arrest or temporary detention of an individual, including the identity of the person arrested or detained, the nature of the arrest or detention, and the charge, if any.

"Investigative records" means the reports of any systematic inquiries or examinations into criminal or suspected criminal acts which have been committed, are being committed, or are about to be committed.

"Noncriminal incidents records" means compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths.

"Personnel records" means those records maintained on each and every individual employed by a law-enforcement agency which reflect personal data concerning the em-

ployee's age, length of service, amount of training, education, compensation level, and other pertinent personal information.

"Reportable incidents records" means a compilation of complaints received by a law-enforcement agency and action taken by the agency in response thereto. (1975, c. 290, § 15.1-135.1; 1979, c. 686; 1981, c. 284; 1997, c. 587.)

§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

§ 19.2-264.2. Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

§ 8.01-654.1. Limitation on consideration of petition filed by prisoner sentenced to death.—No petition for a writ of habeas corpus filed by a prisoner held under a

sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or (iii) the expiration of the period for filing a timely petition for certiorari without a petition being filed.

However, notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him. (1995, c. 503; 1998, c. 199.)

§ 8.01-654. When and by whom writ granted; what petition to contain.—A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the

circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124.)